In the Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-777, 72-1129

CLEVELAND BOARD OF EDUCATION, et al., *Petitioners,*

vs.

JO CAROL LA FLEUR, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUSAN COHEN, *Petitioner,*

vs.

CHESTERFIELD COUNTY SCHOOL BOARD, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief of the Attorney General of the State of California, on Behalf of the California Department of Human Resources Development As Amicus Curiae

EVELLE J. YOUNGER
Attorney General of the
State of California

ELIZABETH PALMER
Assistant Attorney General

JOANNE CONDAS
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Telephone:

Attorneys for Amicus Curiae
State of California

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105
193

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES

TEXTS

MISCELLANEOUS

In the Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-777, 72-1129

CLEVELAND BOARD OF EDUCATION, et al., *Petitioners,*

vs.

JO CAROL LA FLEUR, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUSAN COHEN, *Petitioner,*

vs.

CHESTERFIELD COUNTY SCHOOL BOARD, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief of the Attorney General of the State of California, on Behalf of the California Department of Human Resources Development As Amicus Curiae

INTEREST OF THE STATE OF CALIFORNIA

The Attorney General of the State of California files this brief as *amicus curiae* on behalf of the California Department of Human Resources Development. The department is

purposes. What evidence was offered by the Commission to justify its turn about? The Commission did not hold public hearings or invite public debate. It did not suggest that it suddenly devined a heretofore unnoticed Congressional intent. It did not claim to have discovered the law. It simply pronounced its guideline and will seek to win for it judicial approval so that its newest opinion can be raised to the level of judicial fiat.

The *amicus* believes that the Commission's departure from its own precedent can be justified, if at all, only if the Commission proves by pursuasive evidence that this radical shift was caused by very good reasons, *e.g.*, a newly announced Congressional purpose directly relating to the Commission's new theory or by facts that did not exist when the Commission pronounced its earlier opinions. Because the Commission at no time has demonstrated that such reasons exist, its departure from its own precedent should not be countenanced by this Court, particularly when the Commission's new opinion will cause substantial changes in employer-employee relations including major revisions in employer benefit programs.

Strong support for the *amicus*' position if found in the Fourth Circuit's opinion of *N. L. R. B. v. Quality Manufacturing Co.*[22] and the *amicus* offers that court's well reasoned opinion here as a guide.

In *Quality*, the National Labor Relations Board purporting to interpret the Labor Act held for the first time in its history that an employer violated that Act by discharging an employee who insisted upon union representation at a meeting called by the employer to investigate the employee's conduct. The Court rejected the Board's holding because it "departed from existing case law[,]" and because,

> ". . .never has it been thought, as the Board would hold here, that [statutory] rights require an employer to permit an employee to have a union representative present whenever the employee 'has reasonable ground to fear that the

22. No. 72-1663, decided July 19, 1973 (83 LRRM 2817).

interview will adversely affect his continued employment or even his working conditions.' "

The Court observed that the Board did not justify or support its "new theory" by a pursuasive analysis of the Labor Act or of legislative history, and concluded that the Board has no power to "alter or rearrange employer-employee relations to suit its very whim." The parallels between *Quality* and these cases are clear. Both in *Quality* and in these cases, an agency claiming to interpret its statute departed from its own precedent without advancing pursuasive reasons for doing so. In both *Quality* and in these cases, the new agency opinion will have considerable impact on employer-employee relations. As did the court in *Quality* this Court should also reject an agency's departure from its own precedents when the agency advances no cogent reasons to justify its shift.

We have seen why this Court should give no weight to the Commission's guideline on pregnancy and childbirth. Moreover, it is apparent that an employer's maternity policy whether pertaining to maternity leave or benefits does not violate Title VII even though pregnant women are treated differently than other employees. Because the Solicitor General and other parties have raised the issues of Title VII of the Civil Rights Act of 1964, the thrust of parts I and II of this brief has been directed to that Act. The *amicus* now turns in part III to the constitutional question raised by the maternity guidelines in these cases.

III.

THE MATERNITY LEAVE REGULATIONS DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

A regulation is measured against the Fourteenth Amendment when it creates a classification of individuals and then treats the individuals in this classification differently than other persons are treated. However, as Justice Frankfurter observed, "classifications is inherent in legislation; the Equal Protection

Clause has not forbidden it.[23] Consistent with these observations, this Court has stated that the Equal Protection Clause does not forbid all statutory classification or discrimination, but only that discrimination that can be called arbitrary or invidious.[24] These observations were amplified by the illuminating discussion of Chief Justice Burger in *Reed* v. *Reed, supra.* There, a state statute gave mandatory preference for the male when both a male and a female otherwise equally entitled applied for letters of administration of a decedent's estate. The Chief Justice observed:

> "[T]his Court consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. (citations omitted) The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated alike . . .'" at 75-76.

The lower courts, too, have recognized that legislative and administrative enactments may treat different classes of persons in different ways without offending the Equal Protection Clause. In *Williams* v. *McNair,* 316 F. Supp. 134, 136 (DC DC, 1970) the Court stated:

> "The Equal Protection Clause of the Fourteenth Amendment does not require identity of treatment for all citizens, or preclude a state, by legislation, from making classifications and creating differences in the rights of different groups. It is only when the discriminatory treatment and

23. *Morey* v. *Doud,* 354 U S. 457, 472 (1975).

24. "The Equal Protection Clause goes no further than the invidious discrimination." *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 489 (1955); *Morey* v. *Doud, supra; Lindsley* v. *National Carbonic Gas Co.,* 220 U. S. 61.

varying standards, as created by the legislative or administrative classification are arbitrary and wanting in any rational justification that they offend the Equal Protection Clause." (Citations omitted.)

Because this Court has interpreted the Equal Protection Clause as proscribing only arbitrary and invidious statutory discrimination, this Court has developed tests to determine whether or not a regulation creates an arbitrary or invidious discrimination. These tests may be called the "rational basis" or "compelling state interest" tests and it is to a discussion of this Court's application of these tests that we now turn.

A. This Court Has Utilized the Rational Basis Test and the Compelling State Interest Test to Determine Whether Or Not the Equal Protection Clause Proscribes a Statutory Classification and Discrimination.

The rational basis test has been generally employed when this Court has looked to the Equal Protection Clause in considering the constitutionality of a state's regulation. Under this standard of review, a state legislature is presumed to have acted within its constitutional power and a "legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest."[25] The compelling state interest test, considered by this Court to be an exception to the usual standard of review expressed in the rational basis test, has been utilized by this Court only to review legislative enactments that abridged fundamental constitutional rights or that involved classifications that can be labeled as "suspect". This standard of review does not accord to legislative judgments the usual presumption of validity and requires that the state rather than the complainants justify discrimination found in the enactment by showing that a compelling state need is promoted by this discrimination.

25. *Frontiero* v. *Richardson, supra,* 1768 (1973).

1. The Rational Basis Test.

In applying this test, this Court has recognized that states must have a broad scope of discretion in enacting regulations even if these regulations treat different classes of individuals in different ways and has, therefore, deferred to the judgment of the legislators unless the discrimination created by the regulation has absolutely no rational relationship to a legitimate state purpose. This Court has summarized the rules for testing a discrimination under the rational basis test:

> "The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon a reasonable base, but is essentially arbitrary."[26]

Consistent with its pronouncement in *Lindsley*, this Court more recently has observed:

> "Indeed, it has long been the law under the 14th Amendment that 'a distinction in legislation is not arbitrary if any state of facts reasonably can be conceived that would sustain it . . . the rule of equality permits may practical inequalities' " (Citations omitted)[27]

Still more recently in discussing the rational basis test, this Court has stated:

---

26. *Lindsley* v. *National Carbonic Gas Co., supra,* at 78-79.
27. *Rapid Transit Corp.* v. *New York,* 303 U. S. 573 (1938).

> "the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their law results in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[30]

While under the reasonable basis test, a statutory discrimination will not be invalidated by the Equal Protection Clause if any facts can be conceived that would sustain it, it will not be necessary here, as will be seen below, to search long to discover that the classification in the School Board's maternity leave regulation has a patently rational relationship to the regulation's legitimate purpose. Consequently, as will be argued below, the Board's maternity leave regulation while treating pregnant teachers differently than other teachers does not violate the Fourteenth Amendment.

This Court, then, by applying as a general rule the rational basis test to determine if a discrimination violates the Equal Protection Clause has recognized and acknowledged that it should not sit as a super legislature, but rather, should presume that the states acted within their constitutional powers even though the regulation creates some inequality by treating different classes of persons in different ways. Only in exceptional circumstances has this Court applied the other test—the compelling state interest test—to determine if a statutory classification and discrimination should be avoided by the Equal Protection Clause.

---

28. *McGowan* v. *Maryland,* 366 U. S. 420, 425 (1960).

2. The Compelling State Interest Test.

This test has been applied only when a regulation creates a classification which may be judicially regarded as "suspect" or when the regulation may result in an abridgement of a constitutionally guaranteed (or fundamental) right.[29] We will consider each of these branches of the compelling interest test in turn.

(a) *The Suspect Classification.*

While it is difficult to formulate a concise definition of a "suspect classification" we learn from the cases that when a statute creates a classification that is based upon "an immutable characteristic determined solely by the accident of birth," and then imposes special disabilities upon members of that classification, the classification has been treated as suspect, subjected to strict judicial scrutiny, and allowed only if shown to be necessary to promote a compelling governmental interest.[30] This Court has found that classifications based upon race, alienage, national origin, and sex are inherently suspect because these characteristics frequently bear "no relation to ability to perform or contribute to society."[31] Thus, when a regulation focused on one racial group and treated this group differently than it treated members of other groups, the racial classification created by the regulation was regarded as constitutionally suspect and was subject to strict scrutiny by this Court.[32] Similarly, where the sole basis of a classification created by a statute was the sex of the individuals involved, four Justices found the classification inherently suspect and subjected it to close scrutiny. *Frontiero*

29. *San Antonio Independent School District* v. *Rodriguez,* 93 S. Ct. 1278 (1973).

30. *Frontiero* v. *Richardson, supra* (1973); *Shapero* v. *Thompson,* 394 U. S. 618 (1969); *McLaughlin* v. *Florida,* 379 U. S. 184 (1964); *Graham* v. *Richardson,* 403 U. S. 365 (1971); *Korematsu* v. *United States,* 323 U. S. 214, 216 (1944).

31. *Frontiero* v. *Richardson, supra,* at 1770.

32. *McLaughlin* v. *Florida, supra.* There, the color of the skin determined whether there existed a criminal offense.

v. *Richardson, supra.* There, a federal statute commanded "dissimilar for men and women who are . . . similarly situated [,]" by providing that a service woman may not claim her husband as a dependent in order to obtain increased benefits unless he is in fact dependent upon her for over one-half of his support, while a service man may claim his wife as a dependent without regard to whether or not she is dependent upon for him for any part of her support. The *Frontiero* case will be discussed in more detail below as the *amicus* will demonstrate that the classifications created by the maternity leave regulations are not sex based classifications and consequently should not be subjected to strict judicial scrutiny under the compelling state interest test.

This Court has not only employed the compelling state interest test to review statutes which create classifications that are suspect, but also has utilized this test when determining the constitutionality of legislation that prevents the exercise of fundamental constitutional rights. We turn now to cases where this Court has considered whether rights asserted were, in fact, "fundamental" and whether the compelling interest or strict scrutiny test should be employed while reviewing legislative judgments that abridge those rights.

(b) *Fundamental Constitutional Rights.*

In *San Antonio Independent School District* v. *Rodriguez, supra,* this Court defined a fundamental right as a right that is "explicitly or implicitly guaranteed by the Constitution." In the earlier case of *Shapiro* v. *Thompson, supra,* Justice Stewart's observations are consistant with those of the Court in *Rodriguez*:

> "The Court today does *not* 'pick out particular human activities, characterize them as "fundamental," and give them added protection. . . .' To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands." 394 U. S., at 642. (Emphasis from original.)

In practice, this Court has found few rights to be fundamental and has sparingly employed this branch of the compelling interest test when reviewing the constitutionality of legislative enactments. The few rights that this Court has found to be fundamental because they are protected specifically by the Constitution include the right to participate in elections on an equal basis with other citizens in the jurisdiction,[33] the right to travel interstate,[34] the right of personal privacy,[35] and rights related to First Amendment interests.[36] However, this Court has found the following rights not to be fundamental constitutional rights because they are not explicitly or implicitly guaranteed by the Constitution, even though they have been recognized by this Court to be rights of considerable social significance: the right to welfare benefits;[37] the right to safe and sanitary housing;[38] the right to education;[39] and the right to pursue a particular occupation.[40] In *Dandridge*, this Court recognized that the "administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings[.]"[41] However, this recognition provided this Court no basis for departing from its traditional (rational basis) method of analysis of legislative classifications involving questions of economic and social policy because the right to welfare benefits while socially significant was not constitutionally guaranteed.

---

33. *Dunn* v. *Blumstein*, 407 U. S. 330 (1972).

34. *Shapiro* v. *Thompson*, *supra*.

35. *Skinner* v. *Oklahoma*, *ex rel. Williamson*, 316 U. S. 535 (1942).

36. *Police Department of the City of Chicago* v. *Mosley*, 408 U. S. 92 (1972).

37. *Dandridge* v. *Williams*, 397 U. S. 471 (1970).

38. *Lindsey* v. *Normet*, 405 U. S. 56 (1972).

39. *San Antonio Independent School District* v. *Rodriguez*, *supra*.

40. *Williamson* v. *Lee Optical Co.*, *supra*; *Kotch* v. *Board of River Port Pilot Commissioners*, 330 U. S. 552 (1947).

41. *Dandridge* v. *Williams* at 485.

Similarly, in *Lindsey* this Court recognized the importance of decent, safe and sanitary housing but stated:

> " . . . the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease, without the payment of rent. . . . Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions." at 74.

In *Rodriquez*, this Court stated:

> "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation."

The lesson of the cases discussed in this sub-part is plain:

First, a suspect classification does not exist unless a regulation creates a classification that is based upon "an immutable characteristic determined solely by accident of birth," and then imposes special disabilities upon members of that classification.

Second, this Court will neither create substantive constitutional rights in order to guarantee them equal protection of the laws, nor subject state legislation to strict scrutiny because this legislation is of social significance. Rather, individual interests are characterized as fundamental and given added protection only if the right to pursue these activities is explicitly or implicitly guaranteed by the Constitution.

Third, unless a legislative enactment abridges fundamental constitutional rights or involves suspect classifications, this Court will employ the rational basis or traditional Equal Protection

analysis in determining whether or not a legislative classification is constitutional. Under this test, "a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest.[42]

Because the maternity leave regulations neither involves a suspect classification nor prevents the exercise of a fundamental constitutional right, the Court should employ the rational basis or traditional test to evaluate the constitutionality of the classification created by these regulations and find that the classification does not offend the Equal Protection Clause. To this argument we now turn.

B. The Maternity Leave Regulations Do Not Violate the Equal Protection Clause of the Fourteenth Amendment.

1. The Maternity Leave Regulations Do Not Create or Involve a Suspect Classification.

In *Frontiero* v. *Richardson, supra,* this Court stated, "that classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." At 1768. This Court went on to explain that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth . . . And what differentiates sex from such non-suspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." at 1770.

Sex, then, is considered to be a suspect classification because it is an immutable characteristic determined solely by the accident of birth and because it bears no relation to ability to perform or contribute to society. Unlike sex, pregnancy is not an immutable characteristic and it cannot be said that pregnancy bears no relation to ability to perform or to contribute to society. Consequently, following the reasoning in *Frontiero* it is clear

42. *Frontiero* v. *Richardson, supra,* at 1768.

that pregnancy cannot be a suspect classification even though sex, race, and national origin may be.

The basis of the holding in *Frontiero* is a further reason to distinguish that case from the instant case. In *Frontiero,* this Court added:

> ". . . any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution] . . .' We therefore conclude that, by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the due process clause of the Fifth Amendment in so far as they require a female member to the dependency of her husband." at 1772.

Under the rationale of *Frontiero,* then, a regulation that treats men and women differently, would violate the Fourteenth Amendment only if it were maintained for the sole purpose of achieving administrative convenience. In the instant case, not only is the classification created by the maternity regulation not sex based or suspect, but as a further distinction between this case and *Frontiero,* the purpose of the maternity regulation is not administrative convenience. Rather, as will be discussed below, the main purpose for the maternity regulation is the need to preserve the continuity of education in the classroom. Consequently, because administrative convenience is not the primary purpose of the maternity regulation, following *Frontiero,* the regulation does not violate the Equal Protection Clause even assuming *arguendo* it treats males and females differently.[43] Because pregnancy, unlike sex, is not a suspect

43. The *amicus* contends that discrimination based upon a sex classification can occur only when the two sexes are in actual or potential competition. The maternity leave regulation does not involve competition between men and women and consequently does not treat men and women who are similarly situated differently. For this additional reason, the maternity regulation does not violate the Equal Protection Clause. *Reed* v. *Reed, supra.*

classification, the compelling interest test can be utilized to review the constitutionality of maternity regulation only if that regulation abridges a fundamental constitutional right.

2. The Maternity Leave Regulations Do Not Abridge a Fundamental Constitutional Right.

This Court in rejecting the opportunity to create "substantive constitutional rights in the name of guaranteeing equal protection of the laws [,]" has stated that the key to discovering whether a right is "fundamental" lies not in its social significance but rather in determining whether the right is explicitly or implicitly guranteed by the Constitution.[44] This Court has held that neither education nor the right to employment is a fundamental constitutional right. In *Rodriguez*, this Court stated that

> "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." at 1297.

In *Dandridge* v. *Williams, supra,* this Court recognized that the usual rational basis standard was to be employed when evaluating the constitutionality of state legislation that restricted the availability of employment opportunities. This recognition indicates that the right to employment opportunities is not a fundamental constitutional right requiring added protection by the application of the compelling interest test. *Dandridge* cited with approval *Goesaert* v. *Clarie,* 335 U. S. 464 (1948) and *Kotch* v. *Board of River Port Pilot Commissioners,* 330 U. S. 552 (1947). In *Goesaert,* this Court upheld a state statute prohibiting women other than wives and daughters of bar owners from becoming bar maids.

Consistent with the opinions of this Court is the Sixth Circuit's opinion in *Orr* v. *Trinter,* 444 F. 2d 128 (1971) cert. denied

44. *San Antonio Independent School District* v. *Rodriguez, supra,* at 1297.

408 U. S. 943 (1972), rehearing denied .... U. S. ..... In *Orr*, a public school teacher alleged that his constitutional rights were violated because the School Board without reason refused to renew his teaching contract. He asserted that the Fourteenth Amendment prevented the State from depriving him of life, liberty and property without due process. While this was a case arising under the Due Process Clause, the court nonetheless in a statement relative to these proceedings held that there is "no constitutionally protected right to government employment." at 133, 134.[45]

Because there is no fundamental constitutional right involved in this case, the argument of respondents that the maternity regulation is over-broad and therefore unconstitutional because it applies uniformly to all pregnant teachers, regardless of individual ability to teach, has no place in this case. As this court observed in *Dandridge* v. *Williams, supra,*

> "If this were a case involving government action claimed to violate the First Amendment guarantee of free speech, a finding of 'overreaching' would be significant and might be crucial. For when otherwise valid governmental regulation sweeps so broadly as to impinge upon activity protected by the First Amendment, its very overbreadth may make it unconstitutional. See, *e.g., Shelton* v. *Tucker,* 364 U. S. 479. But the concept of 'overreaching' has no place in this case. For here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families. For this Court to approve the invalidation of state economic or social regulation as 'overreaching' would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise,

45. Even if the right to employment may be considered as the means to obtain food, clothing, shelter and medical care, this would not enable it to be classified as a fundamental constitutional right. *Goldberg* v. *Kelly,* 397 U. S. 254 (1970).

improvident, or out of harmony with a particular school of thought.' *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488. That era long ago passed in to history. *Ferguson* v. *Skrupa*, 372 U. S. 726.

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago*, 228 U. S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan* v. *Maryland*, 366 U. S. 420, 426."

We have seen that the maternity leave regulations do not operate to the disadvantage of a suspect class or abridge fundamental constitutional rights. Therefore, strict judicial scrutiny is not required. Nonetheless, the maternity leave regulations must be examined to determine if they rationally further a legitimate state purpose and, therefore, do not constitute invidious discrimination in violation of the Equal Protection Clause. To this examination we now turn.

3. The Maternity Leave Regulations Do Not Violate the Equal Protection Clause When the Traditional or Reasonable Basis Standard of Review Is Employed to Evaluate Their Constitutionality.

As this Court stated, "Under 'traditional' equal protection analysis, a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest." *Frontiero* v. *Richardson, supra,* at 1768. The rational basis test then employs three standards: first, a legitimate governmental purpose must be found to exist;

second, the classification created by the statute must be rationally related to and further this legitimate governmental interest; third, all persons within the class must be treated alike.[46]

A School Board has an overriding and fundamental concern to educate students within its jurisdiction and if necessary can enact regulations to further this function. A maternity regulation furthers this legitimate interest because it assures that "sudden disruption of the students' classroom program due to an unforeseen complication in the teacher's condition will be minimized." *La Fleur* v. *Cleveland Board of Education*, 326 F. Supp. 1208, 1213 (1971). That court continued:

> "The requirement of advance notice of termination also allows time for a substitute teacher to work and train with the intended class prior to assuming her full responsibilities, further maintaining continuity in the classroom program. The provision for resumption of employment after the child's birth serves the purposes of maintaining classroom continuity and protecting the health of the mother and child."

Moreover, that court observed:

> "This regulation has minimized the classroom distractions and disruptions which had occurred prior to its adoption, further attesting to its necessity and reasonableness, and this court so finds.
>
> "The problem of the teacher's health and safety, before and after the child's birth, is of itself a valid concern of the school board aside from its interest in the students' education.
>
> "In an environment where the possibility of violence and accident exists, pregnancy greatly magnifies the probability of serious injury."

It is clear therefore that the maternity regulations meet the standards of the traditional or reasonable basis test and the

46. *United States Department of Agriculture* v. *Moreno*, 93 S. Ct. 2821 (1973); *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412 (1920); *Frontiero* v. *Richardson*, *supra*.

classification created by the regulations does not violate the Equal Protection Clause even though the regulations result in different classes of persons being treated in different ways. The crucial question posed by this Court[47] for equal protection cases of "whether there is an appropriate governmental interest suitably furthered by the differential treatment [,]" must be answered here in the affirmative.

While the Cleveland School Board required an unpaid leave of absence from school duties beginning five months before the expected delivery and the Chesterfield County School Board required employment to terminate four months prior to the date of expected birth, this difference merely reflects the individual judgment of each School Board. Such legislative discretion has been respected by this Court.

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results, in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago*, 228 U. S. 61, 69-70."

Whether a School Board should require a leave of absence to begin four or five months before the date of expected delivery is a matter of local concern and depends upon the availability of capable future substitutes and the particular classroom environment. Application of the reasonable basis test by this Court when it determines the constitutionality of a School Board's regulation will allow the local board to continue to exercise this discretion in a manner calculated to achieve maximum classroom continuity. However, application of the stricter standard

47. *Police Department* v. *Mosley*, 408 U. S. 92, 95 (1972).

of review may well require a School Board to forego the goal of classroom continuity and to accommodate the individual teaching desires of each pregnant teacher. Therefore, because the primary duty of a School Board is to educate students and to provide continuity in the classroom to further this function, this Court should apply the rational basis test when it evaluates the constitutionality of a School Board's maternity leave regulations. When this test is applied to the regulations here, their constitutionality is assured.

CONCLUSION.

It is respectfully submitted for the foregoing reasons that this Court should affirm the decision of the Fourth Circuit and reverse the decision of the Sixth Circuit.

Respectfully submitted,

MILTON A. SMITH,
General Counsel,

RICHARD BERMAN,
Labor Relations Counsel,
Chamber of Commerce of the
United States of America,
1615 H Street, N. W.,
Washington, D. C. 20006,

GERARD C. SMETANA,
925 South Homan Avenue,
Chicago, Illinois 60607,

LAWRENCE D. EHRLICH,
JERRY KRONENBERG,
JULIAN D. SCHREIBER,
Borovsky, Ehrlich and Kronenberg,
120 South LaSalle Street,
Chicago, Illinois 60603.